2015

Alan Hoskins, Jr., Plaintiff/Appellant, vs. Ogden Auto Body

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

ALAN HOSKINS, JR., Plaintiff/Appellant, vs. OGDEN AUTO BODY, Defendant/Appellee.	Case No. 20150381-CA Second District Court No. 130904254

APPEAL FROM THE SECOND DISTRICT COURT,
WEBER COUNTY, STATE OF UTAH
THE HON. ERNIE W. JONES, CIVIL NO. 130904254

BRIEF OF APPELLEE AND CROSS-APPELLANT MICHAEL JAMES SHANNON

Robert L. Janicki, #5493
Michael A. Stahler, #13958
STRONG & HANNI, P.C.
9350 South 150 East
Sandy, Utah 84070
Attorneys for Defendant/Appellee/Cross Appellant Michael James Shannon

Karra J. Porter,
Scott P. Evans,
Stephen D. Kelson,
CHRISTENSEN & JENSEN, P.C.
257 East 200 South, Suite 1100
Salt Lake City, Utah 84111
Attorneys for Plaintiff/Appellant

Andrew Morse
R. Scott Young
SNOW CHRISTENSEN MARTINEAU
PO Box 45000
Salt Lake City, Utah 84145
Attorneys for Defendant/Appellee Ogden Auto Body

IN THE UTAH COURT OF APPEALS

ALAN HOSKINS, JR., Plaintiff/Appellant, vs. OGDEN AUTO BODY, Defendant/Appellee.	Case No. 20150381-CA Second District Court No. 130904254

APPEAL FROM THE SECOND DISTRICT COURT,
WEBER COUNTY, STATE OF UTAH
THE HON. ERNIE W. JONES, CIVIL NO. 130904254

BRIEF OF APPELLEE AND CROSS-APPELLANT MICHAEL JAMES SHANNON

Robert L. Janicki, #5493
Michael A. Stahler, #13958
STRONG & HANNI, P.C.
9350 South 150 East
Sandy, Utah 84070
Attorneys for Defendant/Appellee/Cross Appellant Michael James Shannon

Karra J. Porter,
Scott P. Evans,
Stephen D. Kelson,
CHRISTENSEN & JENSEN, P.C.
257 East 200 South, Suite 1100
Salt Lake City, Utah 84111
Attorneys for Plaintiff/Appellant

Andrew Morse
R. Scott Young
SNOW CHRISTENSEN MARTINEAU
PO Box 45000
Salt Lake City, Utah 84145
Attorneys for Defendant/Appellee Ogden Auto Body

PARTIES

ALAN HOSKINS, individually, Plaintiff and Appellant.

MICHAEL JAMES SHANNON, Defendant and Appellee and Cross-Appellant.

OGDEN AUTO BODY, a Utah Corporation, Defendant and Appellee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Other Authorities:

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code § 78A-4-103(2)(j). This case was properly transferred under Utah Code Ann. § 78A-3-102(4) from the Utah Supreme Court, which had jurisdiction under Utah Code Ann. § 78A-3-102(3)(j).

DETERMINATIVE STATUTES & RULES OF PROCEDURE

Not applicable.

STATEMENT OF THE CASE

Nature of Case, Proceedings, and Disposition Below

This is a personal injury case arising from a pedestrian/automobile accident that took place on the evening of October 23, 2012 when Shannon, driving a tow truck owned by his employer, Ogden Auto Body ("Ogden"), was involved in an automobile/pedestrian accident with the Plaintiff-Appellant. Ogden took the position that Shannon was commuting home at the time of the Accident and therefore was not vicariously liable for the Accident.

Like other tow truck drivers, Ogden assigned Shannon to respond to calls within a specific geographic territory. Because his territory was close to his home, Shannon kept his tow truck at his home. His days typically started at 7:00 am when he would leave his home in the company tow truck and go to various locations around the Layton area to wait for calls from the Ogden dispatcher. He would then drive the tow truck to service calls in his area until the evening when he would generally drive his tow truck home. Though Shannon would report when his last service call of the day was completed, he always

understood that he was "on-call" if needed by Ogden to respond to calls in his area if needed during overnight hours.

As Ogden personnel stated in deposition, taking the company tow truck home was "just part of the job" for Ogden drivers so that they could quickly respond to service calls in their respective territory. Ogden's customers expected Ogden to respond to a call within 20-30 minutes. In order to meet this demand, Ogden communicated with Shannon via his cell phone and he was almost always on-call unless he got permission from Ogden to take time-off.

October 23, 2012 was no different. Shannon testified at deposition that he got up and left his home in the morning to begin his work day by waiting at a local parking lot. He responded to what would be his last call of the day, a tow from Layton to Brigham City during the late afternoon hours. At around 6:36pm, Shannon called into Ogden and "cleared out" of the call intent on returning to South Ogden. After stopping to pick up dinner at a local Kneaders, Shannon began driving back to his home. At approximately 7:15pm, he turned left onto 2000 South from Washington Boulevard and collided with the Plaintiff-Appellant as he crossed the street (the "Accident").

On November 17, 2014, Ogden moved for summary judgment for all of the Plaintiffs-Appellants' claims. In sum, Ogden maintained that the so-called "coming and going rule" applied to this case and that it is not vicariously liable for the Accident. (R. 604.) It argued that the undisputed facts demonstrated that Shannon was driving home from work intent on not doing any further work to benefit Ogden that night and that it exercised no control over him at the time of the Accident. (R.604.)

The District Court granted Ogden's motion for summary judgment largely because it summarily determined that Shannon was not within the course and scope of his employment at the time of the Accident. The Court also granted Ogden's motion for summary judgment finding that it was not negligent in the hiring, training, and entrustment of company vehicles to Shannon. (R. 1414, R. 1461.)

Following the hearing, Ogden drafted a proposed order of judgment and sought to have the judgment certified as final under Utah R. Civ. P. 54 (b) to allow for this interlocutory appeal. Plaintiff-Appellant objected to the Utah R. Civ. P. 54 (b) motion. Ultimately, after a hearing on the Utah R. Civ. P. 54 (b) motion, the Court certified judgment for Ogden as final, allowing for this appeal. Though Plaintiff-Appellant initially asked this Court to review the District Court's decision to certify judgment for Ogden pursuant Utah R. Civ. P. 54 (b), in his brief to this Court he did not address this issue. (R. 1743.) Accordingly, Plaintiff-Appellant has waived this issue.

Shannon filed a notice of additional appeal to allow him to address the District Court's determination that he was not within the course and scope of his employment at the time of the Accident. Shannon only agrees with the Plaintiff-Appellant as to this point.

Facts Regarding the Accident and Michael Shannon's Activities and Employment

Police records indicate that the Accident was called into the E911 center at or about 7:19:48 pm (19:19) on October 23, 2012. (R. 652-654, R. 656, R. 658, R. 665.)

As part of his job with Ogden, Shannon drives a 5500 GMC 2009 Truck that is owned and maintained by Ogden (the "Truck"). (R. 890-891, R.904, R.919, lines 20-21.) In order to cover its entire territory, Ogden assigns tow truck drivers to a respective

territory. In this case, Ogden assigned Shannon to handle service calls in the Layton area. During the day he would drive his truck from his home to various parking lots in that area and wait for calls. (R. 886-888.)

Ogden communicates with its drivers using a remote "Ranger" system. Part of that system uses a global positioning system (GPS) to identify the location of their trucks during the day and night. Generally, Ogden would dispatch service calls to the driver that was closest geographically to any service call. Ogden drivers use a tablet computer to accept calls that they take out of their truck and into their home when they are at home in case of a call. (R. 911, lines 1-21, R. 912, lines 6-25, R. 913, lines 1-24, R. 914, lines 4-25, R. 923, lines 3-25, R. 924, R. 925, lines 1-9.) In this case, Shannon was not comfortable using the "Ranger" system and the tablet and instead Ogden communicated with Shannon using his personal cell phone. (R.885, lines 1-8.) While Shannon could take time-off and not accept calls, he had to ask Ogden to do so in advance and notify Ogden that he was not on call so that they could dispatch another driver to handle calls in his region. (R.913, lines 10-20, R. 916, lines 14-21.)

In deposition, both Ogden and Shannon readily admitted that taking the Truck home is "just part of the job" because employees can be called to a tow at any time even on their off-days if needed. As Ogden's Controller, Glenn Logan testified, "[y]ou're always on call." (R.880, lines 22-25, R. 881, lines 1-3, R. 913, lines 21-25, R. 914, lines 1-12, R. 925, lines 14-20.) As a result, Ogden drivers do not have a strict daily schedule or routine. (R. 916, lines 14-21.)

When Ogden hires a new driver, they start them at an hourly wage. However, once

this trial period is completed, a "good" driver, like Shannon, is put on a salary basis and given a territory. They do not have a set number of work hours. (R. 883, lines 6-15, R. 908, lines 3-25, R. 909, lines 1-16.)

In deposition, Shannon admitted that his Truck was essentially his "office". He testified that he took the truck home with him every night so that he could be able to respond to a call as soon as possible and that this was a benefit to Ogden. He also responds to calls from his home and after dinner for the benefit of Ogden. (R.880, lines 22-25, R. 881, lines 1-3, 893, lines 17-25, R. 896, lines 20-25, R. 897, lines 1-2.)

Shannon admits that he is not normally called by Ogden at night except when they are "swamped". This is because he is an older gentleman. That said, he understood that the nature of his work is very unpredictable and he never knew when he would get a call. (R. 893, R. 895, 1-16, R. 899, lines 9-17, R. 900, lines 1-21.)

Ogden handles calls for local police departments and AAA. These, and other Ogden clients, require that its drivers respond to calls within 20-30 minutes that are in Ogden's assigned territory. (R. 893, lines 17-25, R. 926, lines 6-25.)

In discovery, Ogden produced call records for Michael Shannon for the time period between July 1, 2012 and December 1, 2012. These records show that Shannon regularly worked after 7:00pm for Ogden handling calls. For the period of time between July 1, 2012 and December 1, 2012, Shannon completed 44 calls after 7:00pm (19:00). He handled 38 calls after 7:00pm (19:00) in the weeks prior to the Accident. Below is a chart summarizing these 44 calls that involved Shannon working after 7:00pm on a respective day:

Date:	Time Call Received:	Time Call Completed:
July 3, 2012	19:41	20:51
July 6, 2012	18:01	19:28
July 10, 2012	18:19	19:38
July 11, 2012	19:02	20:30
July 11, 2012	20:19	21:08
July 12, 2012	18:39	19:40
July 13, 2012	18:21	19:32
July 17, 2012	18:15	19:27
July 18, 2012	18:33	19:15
July 18, 2012	18:42	19:46
July 19, 2012	19:03	20:16
July 20, 2012	17:35	19:31
July 25, 2012	18:58	19:49
July 25, 2012	19:07	20:42
July 26, 2012	19:42	20:46
August 7, 2012	18:27	19:23
August 8, 2012	18:24	22:29
August 9, 2012	17:55	19:45
August 13, 2012	18:11	19:55
August 20, 2012	18:46	19:50
August 21, 2012	18:28	19:20
August 22, 2012	19:20	19:59
August 24, 2012	18:15	19:13
August 26, 2012	18:06	20:01
August 27, 2012	17:55	20:23
August 29, 2012	17:39	19:22
August 30, 2012	19:14	20:20
Sept. 12, 2012	19:20	20:28
Sept. 17, 2012	18:18	19:29
Sept. 19, 2012	18:15	19:19
Sept. 20, 2012	18:55	20:21
Sept. 25, 2012	18:38	19:34
October 1, 2012	18:13	19:15
October 1, 2012	18:13	19:15
October 5, 2012	18:42	19:30
October 8, 2012	17:43	19:46
October 11, 2012	18:20	19:17
October 17, 2012	18:26	20:27
October 29, 2012	19:37	21:06
November 5, 2012	18:41	20:15
November 12, 2012	18:34	19:28

November 20, 2012 18:10	19:35
November 21, 2012 18:34	19:43
November 27, 2012 18:34	22:00

(R. 928-949)

On the night of the Accident in this case, Shannon returned home after police told him he could do so. Shannon testified that had he been asked by Ogden to respond to a call in the hours after the Accident he would have responded. (R. 897, lines 3-11, R. 899-900.)

Ogden allows drivers to run personal errands with their trucks and to eat meals in their trucks. That said, Shannon testified that he generally did not run personal errands with his company truck without permission and preferred to use his wife's Lexus SUV for personal errands. (R. 881-882, R. 889, lines 2-14, R. 898, lines 1-13, R. 915, lines 6-25.)

After the Accident, Shannon's supervisor spoke with him regarding the Accident. Ogden paid Shannon's citation and hired a lawyer named Randy Richards to defend Shannon for the traffic citation. (R. 892, lines 12-21, R. 917, lines 7-18.)

SUMMARY OF ARGUMENT

The District Court committed numerous legal errors. In sum, scope of employment issues are inherently fact-bound and, unless clear-cut, such determinations are made by the fact-finder. Here, the District Court erred by taking this question from the jury because reasonable minds could differ as to if Shannon was within the course and scope of his employment at the time of the Accident. This determination was not clear-cut by any means.

Ogden argued, almost exclusively, that the "coming and going" exception to *respondeat superior* liability applied because Shannon was merely commuting home at the time of the Accident. However, the District Court did not consider the undisputed facts that demonstrated how Shannon's operation of his employer-provided Truck conferred a benefit to Ogden or how Ogden maintained sufficient control over Shannon and the Truck at the time of the Accident to bring him within the course and scope of his employment by utilizing a GPS tracking system that allowed Ogden to know the location of the Truck and to assign calls to Shannon based on his location.

In addition, Shannon agrees with the Plaintiff-Appellant regarding that the Court should adopt the "instrumentality" exception applied in workers compensation cases in Utah to negligence cases based upon *respondeat superior* but only to the extent that it would apply to employees operating employer-provided vehicles that are necessary for the employee's work.

Finally, Shannon agrees with the Plaintiff-Appellant that Ogden's ratification of Shannon's actions placed him in the course and scope of his employment for purposes of *respondeat superior.*

ARGUMENT

I. THE DISTRICT COURT ERRED IN ITS DETERMINATION THAT SHANNON WAS NOT WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT.

A. The Standard for Vicarious Liability is Fact-Bound and, as in this Case, is More Appropriate for a Jury Determination.

Absent absolutely clear-cut cases, a determination as to if an employer is vicariously liable for the acts of its employee is best reserved for a jury determination.

"An employer may held vicariously liable for the acts of its employee if the employee is in the course and scope of his employment at the time of the act giving rise to the injury." *Castellanos v. Tommy John, LLC,* 2014 UT App. 48, ¶ 39, 321 P.3d 218 (citing *Newman v. White Water Whirlpool,* 2008 UT 79, ¶8, 197 P.3d 654). The test for course and scope of employment involves the three-part *Birkner* test: (1) the employee's conduct must be of the general kind that the employee was employed to perform; (2) the employee's conduct must occur within the hours of the employee's work and the ordinary spatial boundaries of the employment; (3) the employee's conduct must be motivated, at least in part, by the purpose of serving the employer's interest. *Newman*, 2008 UT 79 at ¶9 (citing *Birkner v. Salt Lake County,* 771 P.2d 1053, 1056-1057 (Utah 1989).

The Utah Supreme Court recognized that "[s]cope of employment questions are inherently fact bound." *Newman,* 2008 UT 79 at ¶8. These questions are reserved for the fact-finder and "*must* submitted to a jury 'whenever reasonable minds may differ as to whether the [employee] was at a certain time within the scope of employment.'" *Newman,* 2008 UT 79 at ¶ 10 (emph. in original).

As elaborated, in this case the record before the District Court contained a number of facts to demonstrate that Shannon was within the course and scope of his employment, or at least in a position where reasonable minds could differ, requiring the issue to go to trial. As detailed, Shannon's operation of the Truck at the time of the Accident had a dual purpose because it conferred a benefit to Ogden, at the time of the Accident Ogden had sufficient control over Shannon to bring him within the course and scope of his employment, and his Truck was an instrumentality of his employment suggesting that he was within the course and scope of his employment.

B. Reasonable Minds Could Differ as to if Shannon was in the Course and Scope of Employment at the Time of the Accident.

The District Court's decision would only be appropriate if reasonable minds could not differ as to if Shannon was in the course and scope of his employment at the time of the Accident. The record before the District Court shows that reasonable minds could clearly differ as to if Shannon was in the course and scope of his employment and summary judgment was not appropriate.

i. Shannon's operation of the Truck at the time of the Accident had a "dual purpose" that provided a substantial benefit to Ogden.

Despite the fact that Shannon was driving his Ogden Truck at a time when he was normally working and within his assigned tow territory, Ogden maintains that he was driving home from work and was subject to the so-called "coming and going" rule that exempts Ogden from vicarious liability.

"[A]n employee is not acting within the course and scope of his employment when he is traveling in his own automobile to and from work'". *Newman,* 2008 UT 79 ¶ 8

(quoting *Whitehead v. Variable Annuity Life Ins. Co.*, 801 P.2d 934, 935 (Utah 1989)). The intent of the rule is to avoid the imposition of "unlimited liability...for [the] conduct of [an employer's] employees over which it has no control and from which it derives no benefit. *Id.*

The employer bears the burden of proving the exception to the general rule, or that the "coming and going rule" applies. *State v. 633 E. 640,* 942 P.2d 925, 933 (Utah, 1997) (Payne, J., concurring) (stating that one who claims an exception to the general rule bears the burden of proving that the exception applies); *Jones & Trevor Mktg. v. Lowry,* 2012 UT 39, ¶ 31, 284 P.3d 630, 639 (Utah 2012) ("the burden of proof [is] on the party seeking to have the court apply the exception to the general rule").

There are times when employees have a dual purpose while commuting possibly subjecting the employer to liability. "Where an employee engages in conduct benefitting the employer or which is controlled by the employer" the court weighs the *benefit* to an employer and *employer's control* against the personal nature of the trip to determine where it is appropriate to place liability. *Ahlstrom v. Salt Lake City Corp.,* 2003 UT 4, ¶ 9, 73 P.3d 315 (emph. added). In *Whitehead,* the court implicitly adopted the "dual purpose exception" for negligence cases. 801 P.2d at 937. However, the Utah Supreme Court has not stated whether the "special errand" exception or the "employer-provided transportation exception" applies in negligence cases. *See Ahlstrom,* 2003 UT 4, ¶¶ 16-17, 18.

As the Plaintiff-Appellant points out, the Utah Supreme Court has adopted slightly different scopes of analysis in determining whether an employee is within the course and scope of employment. Appellant's Br. at 16. In negligence cases, there must be a

preponderance of evidence that the employee was acting within the course and scope of employment for there to be liability on the employer. *Tax Comm'n v. Industrial Comm'n,* 685 P.2d 1051, 1053 (Utah 1984); *Salt Lake City Corp. v. Labor Comm'n,* 2007 UT 4, ¶ 22, 153 P.3d 179 (rejecting using the same standard in both workers compensation and negligence cases).

In *Newman,* the Utah Supreme Court concluded that reasonable minds could differ as to if the employee was *only* commuting at the time of the accident when he collided with the plaintiff because employee's regular job responsibilities included hauling materials to job sites for his employer, installing materials, and *"returning"* the materials to his employer. *Newman,* 2008 UT 79 at ¶12 (emph. in original). At the time of the collision, 5:00 am, the employee of the tile and countertop manufacturer was driving his own personal vehicle and trailer carrying tile and countertop materials provided by his employer. The employer maintained that he was driving south on I-15 to commute to work, but the Court started that the fact that the employee was carrying these materials suggested that it was possible that he was "acting in the course and scope of his employment at the time of the accident."[1] *Newman,* 2008 UT 79 at 2, 7.

Ahlstrom discussed a number of cases involving off-duty but "on-call" police officers that were involved accidents and concluded from surveying the cases that there

[1] "We agree with the court of appeals. Sundquist's regular job responsibilities included hauling materials to various job sites, installing the materials, and then *returning* the remainder of the materials to White Water's warehouse. Reasonable minds, therefore, could differ as to whether Sundquist was actually returning materials to White Water--an act that would bring him within the course of his employment--or whether he was simply commuting to work, or perhaps both. Accordingly, an issue of material fact remained, and it should have been submitted to a jury for determination of whether Sundquist was "involved wholly or partly in the performance of his master's business or within the scope of his employment." *Newman,* 2008 UT 79 at ¶12.

may be vicarious liability where the officer was on-call and had special skills. *Ahlstrom,* 2003 UT 4 at ¶¶ 8, 10-12. "The lesson of these cases is that cities are not held liable for commuting accidents of officers in city cars unless there are unique circumstances that tip the balance from a personal trip to one that primarily benefits the department." *Id.* at ¶13.

An employer may be held liable in third-party negligence claims where the predominant purpose of the conduct was not personal. *Whitehead,* 801 P.2d at 937. The Utah Supreme Court has stated that one "useful test" is to determine if the employee's commute has a dual purpose is to consider whether the employer would have sent another employee over the same route or to perform the same function if the trip had not been made. *Id.* Applying this test in *Ahlstrom,* the court determined that "it did not appear vitally necessary to the City that she be accessible while on personal errands," and thus the City only received a mere benefit that was "tangential" to the officer's purpose of driving back home. *Ahlstrom,* 2003 UT 4 at ¶¶ 14-15.

The benefit to the employer does not have to be significant. In a recent Florida case, the Appeals Court stated that there was a question of fact as to if an employee driver who was in between jobs with a company truck was acting for the benefit of his employer when he threw a padlock at the plaintiff believing that the plaintiff was going to rob him of the company's money after a collision. *Valeo v. E. Coast Furniture Co.*, 95 So. 3d 921, 925 (Fla. Dist. Ct. App. 2012).

In this case, there are undisputed facts that demonstrate that it was "vitally necessary" that Shannon, and his truck, "be accessible" to Ogden at the time of the Accident and thus he conferred a substantial benefit to Ogden. In deposition, Shannon

acknowledged that his Truck was his "office" and that he took it home every night so that he was prepared to go to a call—the fact that he was equipped and ready to respond to any call was for the benefit of Ogden. (R.880, lines 22-25, R. 881, lines 1-3, 893, lines 17-25, R. 896, lines 20-25, R. 897, lines 1-2.) Ogden admitted that taking the Truck home was "just part of the job" because employees can be called out at any time. As Glenn Logan testified, "[y]ou're always on call". (R. 913, lines 21-25, 914, lines 1-12, R. 925, lines 14-20.) Having the Truck at home and the driver at the ready was for the benefit of Ogden, who had to ensure that calls were handled within 20-30 minutes for their customer. (R.893, lines 17-25, 926, lines 6-25.) While Shannon testified that Ogden did not ask him to tow any more vehicles for the rest of the night after the Accident (which would be expected after he was involved in the Accident), he testified that his work is very unpredictable and that had he been asked to respond to a call that night he would have. (R. 897, lines 3-11, R. 899-900.)

Accordingly, the record before the District Court contained several undisputed material facts demonstrating that there was a dual purpose for Shannon's drive on that night with a substantial benefit to Ogden in driving the Truck home and its decision should be reversed.

ii. Ogden exercised sufficient control over Shannon at the time of the Accident in order to bring his actions within the course and scope of his employment.

In the alternative, Shannon agrees with the Plaintiff-Appellant that Shannon was within the course and scope of his employment because Ogden exercised sufficient control over him at the time of the Accident.

An employee is within the course and scope of his employment when he is under the employer's control. *Whitehead,* 801 P.2d at 937. In cases that consider the issue in the context of an employee who is driving at the time of the subject incident, the court weighs the employer's control against the personal nature of the trip. *Ahlstrom,* 2003 UT 4, ¶ 9.

Ogden exercised significant control over Shannon at the time of the Accident. Ogden admitted that taking the Truck home was "just part of the job" because employees can be called out at any time. As Glenn Logan testified, "[y]ou're always on call". (R. 913, lines 21-25, 914, lines 1-12, R. 925, lines 14-20.)

The best demonstration of how Ogden maintained control over its drivers was the use of the "Ranger" GPS system that allowed Ogden to identify the exact location of their trucks, at any time of day, and to use that system to assign calls to the driver who was in the most proximate location of a call. Ogden drivers took their "Ranger" tablets out of the trucks with them in order to receive any calls that came from Ogden. (R. 911, lines 1-21, R. 912, lines 6-25, R. 913, lines 1-24, R. 914, lines 4-25, R. 923, lines 3-25, R. 924, R. 925, lines 1-9.) Shannon, being an older man, was not comfortable using these tablets, so Ogden instead directly called his personal cell phone to assign calls to him. (R.885, lines 1-8.)

While Ogden may argue that drivers could be "on" and "off-call", they testified that drivers are assigned calls, at any time, based upon the location of their trucks or if the call was initiated in the driver's respective region. "The nature of the business is not conducive to having a strict schedule for the drivers." (R. 911, lines 3-14, 912, line 25, R. 913, lines 1-6, R. 916, lines 14-21.) Shannon understood this to be the case with him. (R. 893.) Indeed, the record before the District Court showed that for a six month period in 2012,

including the date of the Accident, Shannon completed 44 calls after 7:00pm (the time of the Accident). He handled 38 of those calls in the weeks before the Accident. (R. 928-949.)

When he wished to take time off, he had to notify Ogden and ask that they not call him. (R. 913, lines 10-20, 916, lines 14-21.)

As Shannon drove home on the night of the Accident, he understood that his drive was not merely for his personal benefit of getting home, but that he was subject to Ogden's control because he was subject to being called at any time. Though there were no calls that night, he testified that had he been called he would have responded. (R. 897. Lines 3-11, R. 899-900.)

Accordingly, the District Court had undisputed evidence before that demonstrated that Ogden maintained sufficient control over Shannon at the time of the Accident to bring his actions within the course and scope of his employment.

iii. Shannon's employer-provided Truck was an instrumentality of his employment and its involvement in the Accident suggests that Shannon was in the course and scope of his employment.

As Ogden representatives testified, the employer-provided Truck is a crucial aspect of Shannon's job and was central to his job.

An employer may be vicariously liable when employee using a company provided vehicle is involved in an accident with another while in the course and scope of his employment. *Lane v. Messer,* 731 P.2d 488 (Utah 1986). The issue is if an employee uses a vehicle as an instrumentality of his work or as only a means to commute to and from a "fixed office where the bulk of his work was performed." *Cf. Bailey v. Utah State Indus.*

Comm., 398 P.2d 545, 547 (1965) (holding that within course and scope of employment because "...it appears that the station wagon involved in the accident of this case was an instrumentality of decedent's business and was subject to that use") and *Whitehead v. Variable Annuity Life Ins. Co.,* 801 P.2d 934, 937 (Utah 1989) (Employer was not in the course and scope because he worked a "nine to five schedule" at a "fixed office where the bulk of his work was performed" and was involved in an accident on his commute home).

Lane v. Messer addressed a case where the employee was driving his company-provided vehicle at the time of an accident. In that case, the Court did not deem the employee to have been acting within the course and scope of his employment when he returned home from work, left his home to go to a social club to consume alcohol, and on his way back home struck the plaintiff on the side of the highway. "Messer was not performing any act he was hired to perform and was not motivated in any way by a purpose to serve his employer at the time of the accident" at least in part because the accident occurred outside the time and space of his normal work. *Lane v. Messer,* 731 P.2d 488, 490 (Utah 1986).

Shannon agrees with the Plaintiff-Appellant that, in the alternative, this Court should adopt the "instrumentality exception" in this action for negligence cases but only involving an employer-provided vehicle necessary for the employee's work. Appellant's Br. at 27-32. This is because this case involves a circumstance where the use of an employer-provided vehicle was of such vital importance in furthering the employer's business that the employer's control over Shannon could reasonably be inferred, particularly when the employer controls the instrumentality. *See Lessard v. Coronado*

Paint & Decorating Ctr., Inc., 2007-NMCA-122, 142 N.M. 583, 590, 168 P.3d 155 (N.M. Ct. App. 2007).

Here, Shannon was operating his employer-provided Truck that was an instrumentality of his job at the time of the Accident for work purposes and not for personal reasons. Shannon was "always on call" and did not have a strict schedule. Accordingly, he understood that the nature of his work was that he could be called out at any time. He testified that at the time of the Accident he would have responded to a call if one had come. (R. (R. 897. Lines 3-11, R. 899-900.) He was motivated to serve his employer on that night and at all times. Unlike *Lane,* the Accident took place very close in space and time to when Shannon's last completed tow in Brigham City. Shannon was not on a personal errand hours after returning home. (R. 881-882, R. 889, lines 2-14, R. 898, lines 1-13.) *Cf. Lane,* 731 P.2d at 489-490 (employee drove home and then headed out to social club almost four hours later). Ogden owned the Truck and provided it to Shannon for him to complete his work; taking it home was just "part of the job". (R. 890-891, R. 904, R. 913, lines 21-25, R. 914, lines 1-12, R. 919, lines 20-21, R. 925, lines 14-20.) As demonstrated above, Ogden exerted control over these "instrumentalities" because it always monitored the exact locations of its trucks and dispatched calls according to a truck's respective location. (R. 911, lines 1-21, R. 912, lines 6-25, R. 913, lines 1-24, R. 914, lines 4-25, R. 923, lines 3-25, R. 924, R. 925, lines 1-9.)

Shannon agrees with the Plaintiff-Appellant that the Court should adopt the same instrumentality test that is used in workers compensation cases and apply it to negligence cases such that a factfinder could conclude that one is in the course and scope of his

employment when the employee is operating an employer-provided vehicle necessary for the employee's work. If this were a workers compensation case, that certainly would be the conclusion here. *See Bailey,* 398 P.2d at 547 (determining that the decedent was in the course and scope of employment because the car he was driving was for work purposes and was an instrumentality of his employment and not for personal use); *Cf. Ahlstrom,* 2003 UT 4, ¶17 (officer voluntarily participated in an optional program that allowed her to take her police cruiser home and "was not required to use her employer's car for her commute home").

B. Ogden's other Actions Demonstrate that it Ratified His Conduct and thus Shannon was in the Course and Scope of Employment.

Finally, there are other facts that demonstrate Ogden felt as if it was responsible for the Accident as Shannon's employer.

It is a well-settled principle of agency law that "[a] principal may impliedly or expressly ratify an agreement made by an unauthorized agent." *Dillon v. S. Mgmt. Corp.,* 2014 UT 14, ¶28, 326 P.3d 656, 665. "[R]atification requires the principal to have knowledge of all material facts and an intent to ratify." *Id.* "A deliberate and valid ratification with full knowledge of all the material facts is binding and cannot afterward be revoked or recalled". *Id.* "'Mere ratification' by an employer is precisely what justifies an employer's liability for the agent's actions." *Diversified Holdings, L.C. v. Turner,* 2002 UT 129, ¶ 36, 63 P.3d 686, 701 (quoting RESTATEMENT (SECOND) OF TORTS §909(a) (1979)).

Here, Ogden ratified the actions of Shannon when it retained Randy Richards to assist Shannon with the citation for this Accident and when it paid his citation. As Shannon testified, Ogden "took care" of this citation for him. (R. 892, lines 12-21, R. 917, lines 7-18.) Ogden knew of the Accident and the citations and still provided Shannon with counsel at its own expense and paid his citation.

While Ogden has argued that the fact that Shannon had just picked up his dinner, Ogden allowed its drivers to eat in their trucks while they were working. That fact, alone, does not demonstrate that Shannon understood that he was "off duty." (R. 915, lines 6-25.)

In addition, Ogden allowed drivers to use their company trucks to run personal errands. Shannon admitted, however, that he does not do so without permission and that he preferred to drive his wife's Lexus. (R. 881-882, R. 889, lines 2-14, R. 898, lines 1-13, R. 915, lines 6-25.)

Accordingly, there was evidence before the District Court that Ogden ratified Shannon's actions by providing him with counsel and paying his citation. They also took no steps, prior to the Accident, to prevent drivers from eating in their trucks or running personal errands on company time. These facts demonstrate that Ogden understood that Shannon was within the course and scope of his employment and reversal is appropriate.

II. BECAUSE THE DISTRICT COURT ERRED IN RULING THAT SHANNON WAS NOT ACTING WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT, SUMMARY JUDGMENT FOR OGDEN AUTO BODY SHOULD BE REVERSED.

The District Court's only basis for granting Ogden Auto Body judgment as a matter of law with regards to Plaintiff's *respondeat superior* claim was that Shannon was not acting within the course and scope of his employment. As both the Appellant and Shannon have demonstrated that the ruling was erroneous, judgment must be reversed, in part.

CONCLUSION

Shannon respectfully asks the Court to REVERSE the District Court's Order Granting Defendant Ogden Auto Body's Motion for Summary Judgment as to the *respondeat superior* claim, and remand the case for further proceedings.

DATED this 28th day of December 2015.

STRONG & HANNI

By: */S/ Michael A. Stahler*
Robert L. Janicki
Michael A. Stahler
Attorneys for Michael James Shannon

MAILING CERTIFICATE

I hereby certify that on the 28th day of December 2015 two true and correct hard copies and one CD copy of the foregoing appellee brief was mailed via U.S. mail, postage prepaid, to the following:

Karra J. Porter,
Scott P. Evans,
Stephen D. Kelson,
CHRISTENSEN & JENSEN, P.C.
257 East 200 South, Suite 1100
Salt Lake City, Utah 84111
Attorneys for Plaintiff/Appellant

Joseph Steele
C. Ryan Christensen
SIEGFRIED & JENSEN
5664 S. Green Street
Murray, Utah 84123
Attorneys for Plaintiff/Appellant

Andrew Morse
R. Scott Young
SNOW CHRISTENSEN MARTINEAU
10 Exchange Place, 11th Floor
PO Box 45000
Salt Lake City, Utah 84145
Attorneys for Defendant/Appellee Ogden Auto Body

By: */S/ Michael A. Stahler*

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Utah Rule of Appellate Procedure 24(f)(1) because it contains 5,864 words.

2. This brief complies with the typeface requirements of Utah Rule of Appellate Procedure 27(b) because it uses a proportionally spaced typeface of 13-point font size.

DATED this 28th day of December, 2015.

STRONG & HANNI

By: */S/ Michael A. Stahler*
Robert L. Janicki
Michael A. Stahler
Attorneys for Michael James Shannon

No addendum to Appellee's Brief is necessary, under Rule 24(a)(11) of the Utah Rules of Appellee Procedure.